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DOLLAR TREE STORES, INC.

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

11 KASSONDRA BAAS and KELLY
LOFQUIST, individually and on behalf of all
12 others similarly situated,

13 Plaintiffs,

14 v.

15 DOLLAR TREE STORES, INC.,
16 Defendant.

CASE NO. C 07-03108

**[PROPOSED] ORDER IN
SUPPORT OF DEFENDANT
DOLLAR TREE STORES, INC.'S
MOTION TO DISMISS AND/OR
STRIKE PLAINTIFFS'
COMPLAINT**

DATE: August 24, 2007
TIME: 9:00 a.m.
DEPT: Courtroom 2, 17th Flr.
JUDGE: Hon. Jeffrey S. White

COMPLAINT FILED: June 13, 2007
TRIAL DATE: No date set.

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20 The motion to dismiss and/or strike Plaintiffs' complaint pursuant to Fed. R.
21 Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(f) filed by Defendant Dollar Tree Stores, Inc.
22 ("Defendant ") came on for hearing on August 24, 2007 at 9:30 a.m. before this Court,
23 the Honorable Jeffrey S. White presiding. Maureen E. McClain and Alex Hernaez, Kauff,
24 McClain & McGuire LLP, appeared as attorney for the Defendant and Donald S. Edgar,
25 Edgar Law Firm, appeared as attorney for Plaintiffs Kassondra Baas and Kelly Lofquist
26 ("Plaintiffs").

27 After full consideration of the parties' papers, as well as the argument of
28 counsel, the Court finds as follows:

(1) Plaintiffs' Complaint does not comport with the requirements of Fed. R. Civ. P. 9(b). See *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Plaintiffs may file an amended Complaint within thirty days. To avoid a subsequent dismissal with prejudice, Plaintiffs shall identify in their amended pleading: (1) the names of any employees participating in the alleged fraud; (2) any documents evidencing the alleged fraud; (3) the names of any employee harmed by the alleged fraud; (4) the "time, place, and specific content" of any false representations; (5) any specific instances of the fraud being committed; and (6) any other facts known by Plaintiffs regarding the alleged fraud. Plaintiffs shall also plead facts showing a basis to bring this lawsuit on a state-wide basis.

(2) Count VIII is dismissed with prejudice because what Plaintiffs allege is a type of remedy and not a cause of action.

(3) The class action allegations brought under Rule 23 are dismissed in that they conflict with the collective action under the FLSA, 29 U.S.C. § 216(b). *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006); see also *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir 1975) ("Rule 23 cannot be invoked to circumvent the consent requirement of the third sentence of FLSA § 16(b) which has unambiguously been incorporated into ADEA by its Section 7(b)."); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977); *Neary v. Metropolitan Prop. & Cas. Ins. Co.*, 472 F. Supp. 2d 247, 248 (D. Conn. 2007). This Court shall maintain jurisdiction of Plaintiffs' FLSA claim pursuant to 28 U.S.C. § 1331.

(4) The following items are hereby struck from the Complaint and shall not be re-alleged:

- the words "and 2699 et seq." from page 22, line 13 and page 23, line 27 of the Complaint on the grounds that the Complaint fails properly to allege that Plaintiff complied with the administrative prerequisites for filing an action for civil penalties. See *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 376 (2005) ("Section 2699.3, subdivision (a),

1 provides the administrative procedures that must be followed before an
 2 aggrieved employee may file a civil action to recover civil penalties under
 3 section 2699 for violations of any of the Labor Code provisions identified in
 4 section 2699.5”);

5 • “203” and “226” (referring to the respective sections of the California
 6 Labor Code) from paragraph 56 of the Complaint (see p. 13:22) on the
 7 grounds that the penalties referenced in these sections of the Labor Code
 8 are not recoverable under Business & Professions Code section 17200 *et*
 9 *seq.* See *Tomlinson v. Indymac Bank*, 359 F. Supp. 2d 891,894-895 (C.D.
 10 Cal. 2005) (holding that penalties are not available to private litigants in a
 11 UCL action);

12 • the words “preliminary and” from paragraph 18 of the Prayer for
 13 Relief at page 24, line 5 of the Complaint, paragraph 19 of the Prayer for
 14 Relief at page 24 of the Complaint, and the words “temporary restraining
 15 order, a preliminary injunction, and a” from paragraph 20 of the Prayer for
 16 Relief at page 24, lines 10-11 on the grounds that Plaintiffs have not
 17 alleged injuries supporting a finding of irreparable harm because their
 18 alleged injuries can be remedied through a damages award or a
 19 restitutionary award. See *e.g.*, *Givemepower Corp. v. Pace*
 20 *Compumetrics, Inc.*, 2007 U.S. Dist. LEXIS 20886, 18-19 (S.D. Cal. 2007)
 21 (setting forth the requirements for injunctive relief) (citing *Rent-A-Center,*
 22 *Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th
 23 Cir. 1991); see also *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“Mere
 24 injuries, however substantial, in terms of money, time and energy
 25 necessarily expended are not enough” to constitute irreparable injury)
 26 (quotation omitted); and

27 • the words “IWC Wage Order No. 9 [revised]” from page 9, line 4 of
 28 the Complaint on the grounds that the referenced Wage Order

1 applies to the transportation industry (*Watkins v. Ameripride Servs.*,
2 375 F.3d 821, 825 (9th Cir. 2004)) and not the retail services
3 industry.

4 **IT IS SO ORDERED.**

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7 DATED: _____

Hon. Jeffrey S. White
United States District Court Judge

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